Supreme Court, U. S.
FILED
JAN 16 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-516

Borden, Inc.,

Petitioner,

vs.

Bob Bergland, Secretary of Agriculture,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF

STUART S. BALL
H. BLAIR WHITE
DAVID T. PRITIKIN
One First National Plaza
Chicago, Illinois 60603

WALTER W. KOCHER
GLENN S. DENNIS
EDWARD A. MATTO
180 East Broad Street
Columbus, Ohio 43215

Counsel for Petitioner

SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603

Of Counsel

January 15, 1979

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. Despite the Sophistical Claims by the Secretary to the Contrary, the *Per Curiam* Order Is in Direct Conflict with *Fairmont* and *Abbotts* in Ordering the Case Remanded to the Secretary 3

II. The *Per Curiam* Order Is Also in Direct Conflict with *Fairmont* and *Abbotts* in Holding That the "Damages" in an Overpayments Case Should Not Be the Amount of the Overpayments but May Be Substantially Reduced by So-called "Equitable" Considerations 7

III. The *Per Curiam* Order, in Requiring Remand to the Secretary for an "Evidentiary Hearing" as to the Amount of Borden's "Damages" Is Totally Inconsistent with the Original Decision of the Same Court Holding That Borden's Damages Were Its Overpayments and Ordering the District Court to Determine the Amount; and Thus the *Per Curiam* Order Violates the Doctrine of "Law of the Case" .. 8

IV. The Secretary Continues to Ignore the Historical and Logical Differences between the Remedies of Repayment of Unlawful Overcharges and of Equitable Restitution 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES — Page

Abbotts Dairies Division of Fairmont Foods Co. v. *Butz*, 584 F.2d 12 (3rd Cir. 1978) ..... *passim*

Abbotts Dairies Division of Fairmont Foods Co. v. *Butz*, 438 F.Supp. 629 (E.D. Pa. 1977) 2, 5

Atlantic Coast Line v. *Florida*, 295 U.S. 301 (1935) 10

Borden, Inc. v. *Butz*, 544 F.2d 312 (7th Cir. 1976) 1, 7, 8

Fairmont Foods Co. v. *Hardin*, 442 F.2d 762 (D.C. Cir. 1971) ..... *passim*

Moss v. *C.A.B.*, 521 F.2d 298 (D.C. Cir. 1975) . 10

Nader v. *Allegheny Airlines*, 426 U.S. 290 (1976) 4

Williams v. *Washington Met. Area Transit Com'n*, 415 F.2d 922 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969) 10

STATUTES

Agricultural Marketing Agreement Act of 1937 (7 U.S.C. §608c) 2, 3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-516

Borden, Inc.,

Petitioner,

vs.

Bob Bergland, Secretary of Agriculture,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

WHAT THIS CASE IS ABOUT

Despite the attempt by the Brief in Opposition ("Brief") to obscure this essential conclusion, there is an irreconcilable conflict between the decision below and *Fairmont Foods Co.* v. *Hardin*, 442 F.2d 762 (D.C. Cir. 1971) and *Abbotts Dairies Division of Fairmont Foods* v. *Butz*, 584 F.2d 12 (3rd Cir. 1978). Both of the latter cases hold that where illegal overpayments are made because of orders of the Secretary of Agriculture ("Secretary") which are judicially determined to be invalid, the *overpayments* are the milk handler's damages and are to be ascertained by the district court and not by the Secretary. That was also the holding of the Court of Appeals for the Seventh Circuit in its *initial* decision in this case, *Borden, Inc.* v. *Butz*, 544 F.2d 312 (7th Cir. 1976).

On remand to the district court after the initial appeal, Borden moved for summary judgment, pointing to record

evidence showing fully the amounts of the overpayments. No relevant evidence raising an issue of fact as to the amounts was pointed out or advanced by the Secretary; and therefore the district court entered judgment for Borden. On appeal the Court of Appeals changed its mind, and, in a *per curiam* and unreported "Order," and without an opinion explaining its action, ruled that the remand to the district court for computation of overcharges was an improper procedure and that the proper "procedure" was that adopted by the district court for the Eastern District of Pennsylvania in *Abbotts Dairies* v. *Butz*, 438 F.Supp. 629, 636 (E.D. Pa. 1977). In that case the district court ordered the computation of "damages" to be sent back to the Secretary who was to hold a hearing on a wide range of "economic" issues supposedly relevant to that issue.

A few weeks after the *per curiam* Order of the Seventh Circuit was issued here, the Court of Appeals for the Third Circuit reversed the decision of the district court on which the Seventh Circuit had based its ruling. *Abbotts Dairies* v. *Butz*, 584 F.2d 12 (1978). The Third Circuit held, consistent with, and citing both *Fairmont* and the initial decision of the Seventh Circuit *in this case*, that determining the amount of overcharges was for the district court, and not for the Secretary. Nevertheless, on being advised of the action of the Third Circuit, the Seventh Circuit refused to reconsider its *per curiam* Order here.

After Borden's Petition for certiorari was filed in this case, the Secretary announced his decision not to file a petition for certiorari with respect to *Abbotts*. This failure to appeal *Abbotts* is flagrantly incompatible with his opposition to the grant of Borden's Petition here. Obviously, if the court in *Abbotts* wrongly decided a major matter affecting the administration of the Agricultural Adjustment Act, 7 U.S.C. §601 *et. seq.*, ("Act"), he had a duty to appeal it. And, if *Abbotts* was rightly decided, then the *per curiam* Order here was wrong.

Why then does he oppose review of the *Borden* decision while not seeking review of *Abbotts*? The answer is clear. The Secretary opposes review simply because he does not want the Court to give a final decision on a major issue with respect to the administration of the Act and because he fears that such a ruling will foreclose him from frustrating justice in future cases by the same procedural tactics he has used in this and other cases.

Nothing said in the Secretary's Brief in any way answers or meets the reasons given in Borden's Petition why the Court should review this case, resolve the glaring conflict between the several Courts of Appeals, and finally decide what the Secretary has always claimed is an important question in the administration of the Act.

I. Despite the Sophistical Claims by the Secretary to the Contrary, the *Per Curiam* Order Is in Direct Conflict with *Fairmont* and *Abbotts* in Ordering the Case Remanded to the Secretary

Clearly the *per curiam* Order, in holding that the determination of overpayments must be made by the Secretary rather than by the district court, is in direct conflict not only with the initial decision of the Seventh Circuit here but also with *Fairmont* and *Abbotts*. The Secretary's Brief seeks to deny the existence of the conflict by the most specious of arguments.

As to *Fairmont*, the Secretary argues at p. 11 of his Brief:

> "The District of Columbia Circuit did not indicate that a further remand to the Secretary would be improper if the district court considered it necessary and it did not foreclose its own option later to order such a remand. There is thus no conflict. . . ."

But in *Fairmont*, even on this strained interpretation, the district court had at least the discretionary right to make the determination without further remand, while the *per curiam* Order here made remand to the Secretary mandatory. Thus, the two rulings are irreconcilable, even on the Secretary's

reading of them. More importantly, what the Court said in *Fairmont* was:

> "In view of the ease with which payments can be made once determined, we remand to the District Court on the issue of damages, with direction to enter judgment for appellant in the amount ascertained after appropriate proceedings." 442 F.2d at 773.

No candid reader of this passage could possibly believe that the Court contemplated anything other than "appropriate proceedings" in the district court.

The Secretary's argument assumes that the *Fairmont* remand would have permitted the district court to send the case back to the Secretary. Nothing, however, in *Fairmont* hints at a right in the district court to order this. Under the primary jurisdiction doctrine, the issue was *either* for the court *or* the Secretary, and could not possibly have been within the jurisdiction of both. The fact that the case was remanded to the court instead of the Secretary confirms that under *Fairmont* the ascertainment of damages was considered a matter for the court. The conflict between the *per curiam* Order and the decision of the Third Circuit in *Abbotts* is, if possible, even more direct. In *Abbotts*, the court specifically considered and *rejected* the claim that the primary jurisdiction doctrine permitted or required remand to the Secretary to calculate damages.[1] This conclusion is irreconcilable with the *per curiam* Order here. Nevertheless, the Secretary pretends that this case and *Abbotts* can be distinguished:

> "The Third Circuit concluded that, unlike the situation in the instant case, there was no need to determine

[1] "The provision conferring jurisdiction to the Secretary, 7 U.S.C. § 608c(15)(A), does not provide any specific indication that the Secretary may go beyond the determination initially of the validity or scope of a marketing order. In any event the issues left to be decided in this case are not of the kind which are peculiarly within the expertise of the Secretary and which might otherwise justify resort to the administrative process. *See Nader v. Allegheny Airlines*, 426 U.S. 290, 305–06, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976)." 584 F.2d at 20, n.16.

> the price at which Abbotts would have been able to purchase milk if the unlawful order had not been issued. The court noted that Abbotts had continued to purchase milk at the price used as a baseline for calculating damages until the day the invalid order went into effect, thus supporting the inference that it would have been able to continue purchasing milk at that price throughout the period in question." (Brief, p. 11).

But Borden also had purchased its milk at the lawful minimum price, thus permitting the same inference.

The Secretary quotes the Seventh Circuit, arguing that "the calculation of the amount due to petitioner required the consideration of 'complex economic relationships between producers and handlers during the time period for which damages are sought.' " (Brief, p. 7).[2] The Secretary argues that it is possible that Borden "would have had to pay increased prices for its milk even if the old marketing order had not been amended." (Brief, p. 7). This is nothing more than a recycled version of the Secretary's longstanding argument that Borden could not have obtained adequate supplies at the lower prices in effect prior to the unlawful orders. That argument, however, was totally demolished by the Court of Appeals in its initial decision (544 F.2d at 316–17), and no hearings on "complex economic relationships" should be permitted for the purpose of repeated advancement of this same

[2] The statement quoted by the Secretary from the Seventh Circuit's *per curiam* Order paraphrases an earlier quotation in the Order from the reversed district court opinion in *Abbotts*. The *per curiam* Order quoted the district court in *Abbotts* as saying:

> "The determination of . . . [damages] obviously will require evaluation of complex economic relationships between producers and handlers during the time period for which damages are sought. Such matters are peculiarly within the special expertise of the Secretary." (App. p. 27)

It is ridiculous for the Secretary thus to acknowledge that the very rationale of the Seventh Circuit's *per curiam* Order was based on the district court opinion in *Abbotts* and at the same time to deny that the reversal of that opinion by the Third Circuit creates no conflict.

untrue, unfounded, and already rejected claim. *See* Borden's Petition, p. 10.[3] The attempted distinction between *Abbotts* and this case is thus a false one. Facts discussed extensively in the initial opinion of the Court of Appeals refuted the false claim that higher prices were necessary to assure supplies at Borden's plant and support "the inference that [Borden] would have been able to continue purchasing milk at that price", just as clearly as any such inference was supported in *Abbotts*. Indeed, in Borden's case, the inference is strengthened by the fact that the Secretary in answer to Borden's motion for summary judgment, failed to show the existence of evidence sufficient to create a genuine issue as to this point.[4]

The Secretary has thus been unable to advance any respectable reason why the *per curiam* Order of the Seventh Circuit is not directly in conflict with the rulings of the Third Circuit and the District of Columbia Circuit.

[3]In a footnote at p. 7 of his Brief, the Secretary also refers to certain voluntary payments made by Borden to its supplier prior to the imposition of the invalid orders as raising factual issues appropriate for an evidentiary hearing. In the month prior to the illegal orders, Borden had voluntarily paid its supplier an additional 15 cents per cwt. above the Order price on approximately a quarter of the milk that it purchased. (Borden's total overpayments on all of its milk as a result of the illegal orders amounted to 34 cents per cwt.) The district court concluded, as a matter of law, that Borden's recovery should not be reduced on the theory urged by the Secretary that these payments would have continued notwithstanding the illegal orders. However, even if this question was wrongly decided by the district court, the amounts involved are very small and could be readily ascertained from the record without the necessity of any hearing before the Secretary. The question raised is a judicial—not an administrative—one.

[4]An additional conflict exists between the *per curiam* Order and *Abbotts*. On remand after the initial appeal, the district court awarded Borden almost $100,000 in interest on its overpayments. In reversing, the *per curiam* Order of the Seventh Circuit stated that the Secretary should determine "whether interest shall be added." Directly conflicting with this holding is the ruling by the Third Circuit in *Abbotts* that the issue of interest "must" be considered by the district court. 584 F.2d at 21, n.21.

II. The *Per Curiam* Order Is Also in Direct Conflict with *Fairmont* and *Abbotts* in Holding That the "Damages" in an Overpayments Case Should Not Be the Amount of the Overpayments but May Be Substantially Reduced by So-called "Equitable" Considerations

As explained in Borden's Petition at pp. 12–13, the *per curiam* Order abandoned the definition of Borden's damages as the "overpayments which it made pursuant to the invalid orders" (544 F.2d at 319), and by citing and quoting from the district court's opinion, *Abbotts* would allow the Secretary to apply the principles of equitable restitution to reduce, offset or wipe out the actual overcharges. Here, again, the *per curiam* Order was in direct conflict with *Fairmont* and *Abbotts*.

Fairmont held, as did the initial opinion in this case, that "as to damages, we think Fairmont is entitled to recover overpayments which it made pursuant to this invalid Order"—whereas the *per curiam* Order would permit the Secretary to reduce or eliminate the overpayments if he found reason to feel that refund of them would be "inequitable."

Even more important, the *per curiam* Order is in direct conflict with the result reached in *Abbotts*. Even though the latter was begun purely as a "restitution" case, the Third Circuit said:

> "In view of these circumstances, the producers who received overpayments did, we believe, receive enrichment in the form of excessive and unlawful prices, though they were certainly not at fault for the actual issuance of the Secretary's order. Equitable restitution to Abbotts to the extent of the monies in the producer-settlement fund reserve is therefore appropriate in our view. Denial of restitution on the facts presented here would virtually remove any possibility of recovery of overpayments due to invalid milk pricing orders." 584 F.2 at 20.

This reasoning in denying the relevance and admissibility

of "equitable considerations" in that type of case is directly contradictory to the *per curiam* Order here, since the *per curiam* Order encourages the Secretary to defeat or reduce refund of the overpayments on such grounds.

III. The *Per Curiam* Order, in Requiring Remand to the Secretary for an "Evidentiary Hearing" as to the Amount of Borden's "Damages" Is Totally Inconsistent with the Original Decision of the Same Court Holding That Borden's Damages Were Its Overpayments and Ordering the District Court to Determine the Amount; and Thus the *Per Curiam* Order Violates the Doctrine of "Law of the Case"

The initial decision of the Seventh Circuit stated:

> "As to damages, Borden is entitled to recover overpayments which it made pursuant to the invalid orders . . . [W]e remand to the district court on the issue of damages, with direction to enter judgment for Borden, in the amount ascertained after appropriate proceedings." 544 F.2d at 319–20.

The Court cited the passage from *Fairmont*, where the District of Columbia Court of Appeals had used almost identical language in remanding to the district court. Both opinions thus necessarily hold that hearings by the Secretary on the simple issue of computing the amount of the overpayments were totally inappropriate. The remand on the first appeal, based on that ordered in *Fairmont*, mandated the *district court* to determine the overpayments, while the *per curiam* Order prohibited the district court from doing so. The two decisions of the Seventh Circuit in the same case are totally incompatible.

The Secretary's sole answer to this point is that sending the case back to the Secretary by the district court would have been an "appropriate procedure" for the latter to have adopted within the terms of the initial remand (Brief, p. 8). This argument is self-defeating. Even if sending the case to

the Secretary had been an appropriate option under the original remand, it was at most a decision for the district court to make at its discretion; and no reason was advanced by the Seventh Circuit why the district court's election to hold the hearing itself was an abuse of discretion. Even more important is the fact that if remand to the Secretary were now an "appropriate" remedy because of the primary jurisdiction doctrine, it should have been ordered on the initial appeal. By ordering damages to be determined by the district court, the Court was necessarily holding that this matter was not one requiring administrative expertise, but was a judicial matter to be decided by the district court.

With respect to the measure of damages, the Seventh Circuit also reversed itself. Contrary to its first opinion, which held that Borden was entitled to recover "overpayments," the *per curiam* Order mandated a determination of "damages" through a procedure following that of the district court n *Abbotts*. As pointed out earlier, this remand permitted the Secretary to award much less than the total overpayments. Under the *per curiam* Order, damages therefore are *not* to be equated with "overpayments" as the initial decision held.

The initial order of remand properly held that Borden's damages were no more, no less, than the amount of the overpayments. The *per curiam* Order violated good judicial administration by repudiating its initial decision. The weak and fallacious reasoning of the Secretary's Brief cannot obscure the fact that the *per curiam* Order flies in the face of the "law of the case" doctrine.

IV. The Secretary Continues to Ignore the Historical and Logical Differences between the Remedies of Repayment of Unlawful Overcharges and of Equitable Restitution

The Secretary reiterates (p. 9) his mistaken argument that recovery of "excessive charges occasioned by unlawful rate increases" can only be recovered by invocation of the equitable

remedy of restitution; he persists in ignoring the established legal right to recover unlawful overcharges as damages for a tort—a remedy sounding in law rather than equity. The distinction is pointed out at pp. 22–24 of Borden's Petition. The line of "restitution" cases cited and relied on by the Secretary[5] (Sec. Br. p. 9) were discussed and found irrelevant in *Abbotts*. 584 F.2d at 19–20.

CONCLUSION

The great importance of the issues presented here to the administration of the Milk Market system was admitted by the Secretary in proceedings below and is confirmed by the recent decisions of three Courts of Appeals dealing with them. Though respondent denies that any conflict exists between the Circuits, the Seventh Circuit here relied, for the *exclusive* rationale of its Order, on a district court opinion subsequently reversed by the Third Circuit. This, combined with the fact that the Seventh Circuit declined to rehear this case when reversal of that decision was brought to its attention, emphasizes the conflicts.

Respondent is within its rights in deciding not to seek certiorari in the *Abbotts* case. However, respondent's desire to avoid a definitive resolution of the damages issues presented by invalidation of the Secretary's Market Orders should not be permitted to result in blatantly unequal treatment of milk handlers whose cases were decided in different Circuits. Almost nine years after the discriminatory and illegal orders were imposed by the Secretary which had the effect of raising the Order prices applicable to Borden by known, discrete amounts, denial of certiorari would leave Borden still far away from actually recovering its overpayments. Unlike *Abbotts*, which is finally receiving a speedy resolution of its

[5] *Atlantic Coast Line Rd.* v. *Florida*, 295 U.S. 301, 310 (1935); *Moss* v. *CAB*, 521 F.2d 298 (D.C. Cir 1975); *Williams* v. *Washington Met. Area Transit Com'n*, 415 F.2d 922 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969).

damages claims by the district court at the explicit direction of the Third Circuit, Borden can recover its overpayments only if it has the tenacity to endure protracted evidentiary proceedings before the same biased agency that imposed the illegal orders in the first place and then to pursue additional appeals in the courts from the inevitably discriminatory rulings to be expected from the Secretary, as his Briefs foreshadow. Such an "administration of justice" in a manner intended to defeat substantial rights of the parties should not be tolerated. This principle was clearly recognized in *Abbotts* and should be applied here as well.

For the foregoing reasons and for the reasons stated in Borden's Petition, certiorari should be granted.

Respectfully submitted,

STUART S. BALL
H. BLAIR WHITE
DAVID T. PRITIKIN
One First National Plaza
Chicago, Illinois 60603

WALTER W. KOCHER
GLENN S. DENNIS
EDWARD A. MATTO
180 East Broad Street
Columbus, Ohio 43215

Counsel for Petitioner

SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603

Of Counsel

January 15, 1979